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**Environmental Quality Commission**

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Gordon Garner, Vice-Chair, *Prospect*  
Andrew Ernest, *Bowling Green*  
Laura Knoth, *Grand Rivers*  
Kimberly McCann, *Ashland*  
Stephanie McSpirit, *Richmond*  
Eugene Zick, *Russellville*

**KENTUCKY ENVIRONMENTAL QUALITY COMMISSION  
PUBLIC FORUM**

**Meeting Minutes**

September 25, 2008  
Kentucky State University  
Frankfort, Kentucky

**EQC Commissioners Present**

Scott Smith, Chair  
Gordon Garner, Vice Chair  
Andrew Ernest  
Kim McCann  
Stephanie McSpirit  
Laura Knoth  
Eugene Zick

**EQC Staff Present**

Arnita Gadson, Executive Director  
Johnna McHugh, Director of Operations  
LaTisha Barnett, Executive Secretary

**Speakers/Representatives Present**

Davitt McAteer – Coal Impoundment Project  
Hope Childers – Coal Impoundment Project  
Gary Gilliam – DNR, Division of Mine Permits  
Abby Powell – Division of Water  
Tom FitzGerald – Kentucky Resources Council

The Environmental Quality Commission (EQC) held a public forum on Sept. 25, 2008, with 26 people in attendance. The meeting was called to order at 6:00 p.m.

Executive Director Arnita Gadson began the meeting with a welcome. She announced that this meeting is the first public videoconference forum by the EQC. It is hoped that video conferencing will ease some financial burdens within the cabinet.

Commission Chairman Scott Smith also acknowledged the first video conferencing forum for the EQC and he too expressed hope it has a positive



effect on the cabinet budget as well. The Commissioners were asked to introduce themselves. Those present at the Kentucky State University (KSU) video conferencing site, in addition to Commissioner Smith, were Eugene Zick, Kim McCann and Stephanie McSpirit. Andrew Ernest joined the conference from the Western Kentucky University (WKU) videoconference site. Laura Knoth joined the forum from the Cobb Center in Paducah.

Commissioner Smith asked for approval of the minutes from the annual meeting held in August 2008. Johnna McHugh made notice of a correction regarding voting for Division of Water regulations. Commissioner Smith made a correction regarding Bruce Scott's remarks to the commission. Commissioner Zick moved to accept the minutes with the two corrections. The motion was seconded by Commissioner Ernest and passed unanimously.

### **Public comments**

Tim Guilfoyle took the floor at the KSU site to discuss his concerns on mercury. He requested an updated agenda. Guilfoyle stated that he had a child health care background and wanted to let the commission know that there are three new fish consumption advisories. He stated that this is a broad issue. Three million pounds of fish from Kentucky's fisheries are contaminated, and children are eating fish containing mercury. Mercury is highly toxic, more so than lead. We have the technologies to rid the water of mercury, and we need to use them. Lastly, he looks forward to speaking more on this issue at the next public meeting.

Pat Banks also spoke on the mercury issue. To continue where Guilfoyle left off, she said water is not swimmable or fishable. Birth defects from mercury poisoning are higher than all other birth defects combined. She expressed her disbelief in people not knowing about this very important issue. Commissioner Smith asked the EQC staff to find out what the agency has done in the past so we can move forward.

### **Presentations**

Davitt McAteer, former head of MSHA, thanked the commission for the opportunity to speak and Commissioner McSpirit for inviting him to the forum. He presented background information on impoundments. After a coal impoundment disaster in West Virginia those who now run the Coal Impoundment Project (CIP) realized that the people who need to know about the impoundments the most, the ones living downstream from them, knew the least about them. They had no access to the property, information, contact numbers, or knowledge about what was in the Emergency Action Plan (EAP).

The CIP decided to ask for earmark funding for a project that would make EAPs available to the public. Their first initiative toward this development was to

extend an invitation to all parties with an investment in the project. A three-pronged approach was used:

- First, the CIP would make the information available on the internet where people could identify their home and locate impoundments affecting them. Companies would be required to develop emergency evacuation routes and provide information about the impoundment, including information describing how the impoundment looks, number of gallons of water in the impoundment, emergency contact number(s), and the responsible agency. The website is user-friendly to make it as easy as possible.
- Second, the CIP held public meetings for the companies and the public, to look at industry practices. Tabletop exercises were constructed to walk people through various scenarios.
- Third, the CIP took information to the libraries. This allows the public to view important information when it's convenient for them.

Hope Childers discussed the tabletop exercises of the CIP. The idea behind these exercises was getting all the stakeholders together to understand the EAP in a low-cost, low-stress situation. These exercises helped build trust levels among coal companies, state government officials and first responders. Childers brought handouts with a sample scenario from a tabletop exercise.

There were two main concerns with the dissemination of the information about the impoundments. First, some people were worried about terrorist attacks. Second, there was discussion about whether people have the right-to-know about the impoundment near their homes.

Commissioner McSpirit commented that there is no law in Kentucky that companies with impoundments have to notify communities although they notify the state. McAteer said that is something Kentucky needs to work towards. Commissioners Garner and Ernest asked follow-up questions about numbers and funding. McAteer stated that there are approximately 150 impoundments above abandoned mines in West Virginia. Childers stated that the CIP is funded by an earmark from Sen. Boyd.

Gary Gilliam of the Division of Mine Permits said that there is a need for EAPs. He believes the regulations requiring development of EAPs should be by mandate. There are 105 high hazard impoundments in Kentucky. The issue is that DNR does not have the regulatory mandate to require EAPs. Part of the underlying problem is that Kentucky's high hazard impoundments are not just coal impoundments, so other regulatory agencies are involved. The department would like to develop a plan before a huge accident occurs. Gilliam said that many people are involved in drafting regulations, and there are only 3 regulations that simply mention the implementation of an EAP. He

suggests that the commonwealth start the process by mapping areas that could be affected. According to Gilliam, the regulatory agency for EAPs for any given impoundment should be the regulatory agency that regulates construction of that impoundment.

After some questions by the commissioners to Gilliam and to Tom FitzGerald, Commissioner Smith suggested that the commission move to recommend that the Secretary and Governor make this issue their highest priority on the legislative agenda. The motion was made by Commissioner Ernest and seconded by Commissioner Knoth. It was passed unanimously.

After a break, Hank Graddy spoke on behalf of the Sierra Club to again express concern about the problem of mercury pollution in Kentucky waters and across the nation. He presented a handout to the commissioners regarding mercury issues.

Abby Powell, regulations coordinator of DOW, said the anti-degradation lawsuit will not affect the water quality standard regulations. Key changes are “best management practices” definition and some other technical changes. These changes are outlined in the Statement of Consideration.

Tom FitzGerald of the Kentucky Resources Council discussed the water quality standard regulations and the Court of Appeals decision. He outlined some of the issues covered by the Court of Appeals and explained why they should be considered.

In 1979 Kentucky first adopted the requirement of anti-degradation. As part of the 1987 Water Quality Act Amendment there were more specific requirements imposed to hone those anti-degradation policies and to define an implementation strategy. In 1995 Kentucky proposed and in 1997 the EPA rejected, in part, the anti-degradation implementation strategy. In 1999 Kentucky adopted revisions; EPA again rejected them, in part, in 2000.

In May 2001 the number of groups in the state served a notice of intent to sue because the EPA had not put in place an anti-degradation strategy for the state having twice rejected it. In 2004 a suit was filed and in 2005 the EPA approved revised Tier 2 regulations for the state. The district court subsequently upheld those in March of 2006. On Sept. 3, 2008, the 6th Circuit Court issued a ruling which rejected in part and upheld in part the most recent iteration of these regulations.

FitzGerald briefly explained the different tiers of anti-degradation under the Clean Water Act as interpreted by the EPA.

Tier 1 – water bodies that do not have water quality sufficient to meet the designated use.

Tier 2 – those streams and lakes that contain water quality levels in excess of what is necessary to meet at a bottom line level the designated use to keep fish alive and propagating to meet proper usage.

Tier 3 - are the exceptional water bodies which are not allowed except in very limited circumstances to be degraded. They are those that are in the federally designated rivers and other rivers of outstanding national resource concern.

The question has been how do you define the Tier 2 waters? Is it done on a pollutant by pollutant basis or on a water body by water body basis? Pollutant by pollutant would have you looking at each individual pollutant and requiring that before that pollutant level was raised that a discharger would have to justify based on socio-economic analysis, that there was an important need to degrading that water body for that pollutant. So, you could potentially have a water body that is impaired for certain pollutants and is getting anti-degradation analysis for other analysis. The water body by water body approach which Kentucky adopted looks at a number of parameters and says if you meet these parameters than you will be considered in this second tier.

The plaintiffs in the anti-degradation suit challenged the water body by water body approach and said that it should be pollutant by pollutant. The Court of Appeals ruled that although pollutant by pollutant is acceptable and is consistent with the Clean Water Act, it's not mandated and they were going to defer to the EPA if Congress had not specifically spoken to the issue and other courts had allowed either approach.

On the second issue, the plaintiffs argued that it was not reasonable to approve Kentucky's Tier 2 approach to designating anti-degradation because they consider a water body that otherwise is capable of supporting fish, shellfish, wildlife and recreation in and on water as not being eligible for Tier 2 if it is impaired for a designated use. This becomes an issue for drinking water and for fish tissue. The court rejected it, and the plaintiffs have asked for re-hearing on that specific point because they believe the court has misunderstood what the law requires. The other parties will have the opportunity to respond to the petition for re-hearing and then the court will decide whether to do a re-hearing.

After the discussion, Commissioner McCann moved to recommend deferral of the water quality standard regulations to give the cabinet time to initiate further discussion between stakeholders. This will also give the EPA time to decide how they are going to handle the Court of Appeals decision. Commissioner McSpirt seconded the motion, and it passed unanimously.

After the regulation discussion, the commission began discussing internal business. Executive Director Gadson said Secretary Peters will be speaking at the Mayors' Summit. We have received approximately 20 RSVP's for the

summit. A small number might be preferable for facilitation discussion. However, more RSVPS' are expected in the upcoming week.

Commissioner McSpirit created a survey to get an idea of the issues that are most important to mayors. Contact information was obtained from the Kentucky League of Cities, and 382 surveys were sent out. Commissioner Zick said that the EQC staff should contact the Area Development Districts to encourage mayors' attendance. Commissioner McSpirit will summarize the results of the surveys and send this to the commissioners electronically the week of Sept. 29.

On the topic of adventure tourism, Executive Director Gadson said that she is waiting on guidance from the First Lady or the Lt. Governor's representative regarding the ATV concerns. Commissioner Smith said that the commission wants to be involved, but there are other issues coming up that take priority at this time. Commissioner Knoth mentioned that the kick-off is September 26. She agreed with Commissioner Smith to postpone active involvement. Commissioner Ernest would like for Executive Director Gadson to work with Don Dott to stay in the loop, but the commission should put it on the back burner.

Commissioner McSpirit updated the commission on the Martin County Coal NRD Monies. She had a discussion with Leah MacSwords, Ted Withrow and Mike Haines about what the Division of Forestry plans to do with the money. When she knows something further, she will report it to the commission.

The commissioners then discussed agenda formulation for further meetings. Commissioner Smith said agenda items for each meeting should be sent to the staff 30 days prior to the meeting, and the staff should complete a draft agenda 7 days later. A motion to accept was made by Commissioner McCann, seconded by Commissioner Ernest and passed unanimously. Commissioner Garner would like the agenda to be available to the public at least two weeks before each meeting.

Commissioner Ernest asked if there were any bylaws for the commission, and McHugh informed him that there were none. Commissioner Ernest suggested that Executive Director Gadson develop a set of bylaws for the commission. He also commented that if the agendas are available to the public weeks ahead of the meeting, there would probably be more turn out. Executive Director Gadson also commented that speaker confirmation is a major factor in most cases. The staff often has to wait on confirmation from speakers.

Commissioner McCann commented on the times of the meetings. She suggests we hold public meetings around 3:00 p.m. instead of 6:00 p.m. She mentioned that it is unfair to be in the meeting so late and that those who speak towards the end are not getting the same attention. Executive Director Gadson let the commissioners know that the public whom the commission is trying to reach are

at work during that time, and facilities are a lot harder to confirm due to classes taking place during that time.

Commissioner Smith asked the staff to find out what issues and commitments the cabinet has made regarding mercury so that the commission can address them. He also mentioned that Bruce Scott provided a plan at the last meeting. He would like the staff to give the commission the dates Bruce Scott provided in that plan.

With no further business, Commissioner Zick moved to adjourn the meeting. Commissioner McCann seconded, and the meeting was adjourned at 9:07 p.m.

Signed,

Scott Smith, EQC Chair  
November 18, 2008